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Touchdown! A Victory for Injured Fans at Sporting Events?

Hayden v. University of Notre Dame[1]

I. INTRODUCTION

When fans attend sporting events, they usually do so at their own peril. Fans are expected to assume the known risks of flying baseballs, hockey pucks, or footballs. In fact, Judge Cardozo once summarized this situation by saying, "the timorous may stay at home."[2] While sports fans generally assume the risk of liability from acts by players that send balls flying into the stands, the question arises as to the liability of stadium owners for injuries caused when one fan injures another fan after a player has sent a ball into the crowd.

In *Hayden v. University of Notre Dame*, the Indiana Court of Appeals found that one fan criminally injured another fan during a scramble for a loose football that had flown into the crowd after a field goal attempt.[3] The court examined recent Indiana case law that articulated the test for determining whether a landowner's duty to its invitees extends to protecting them against the criminal acts of third parties. This Note evaluates the options the court faced, the potential misapplication of the law to the facts, and the dangerous policy implications that the court may have created in the process.

II. FACTS AND HOLDING

In September 1995, William and Letitia Hayden attended a football game at the University of Notre Dame ("Notre Dame"), in South Bend, Indiana.[4] The Haydens had season tickets to Notre Dame football and sat in their regular seats, located in the south endzone behind the goalpost.[5] During the second quarter of the game, one of the teams attempted either an extra point or field goal attempt.[6] The football was kicked toward the goal, but the net behind the goalpost did not catch the ball, and as a result, the ball flew into the stands near Mrs. Hayden's seat.[7] As the ball started to hit the ground, several people in the crowd lunged for the ball, in order to obtain a souvenir.[8] One fan, seated three rows behind

1. 716 N.E.2d 603 (Ind. Ct. App. 1999).
2. Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (1929).
3. *See Hayden*, 716 N.E.2d at 604.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

Mrs. Hayden, struck her from behind, knocked her down, and injured her right shoulder.[9]

The Haydens sued Notre Dame under a negligence theory for failure to exercise reasonable care to protect Mrs. Hayden.[10] In order to win a negligence claim in the state of Indiana, a plaintiff must prove: "(1) a duty owed to the plaintiff by the defendant; (2) a breach of that duty by the defendant; and (3) injury to the plaintiff proximately caused by that breach."[11] The element at issue in this case was whether Notre Dame owed Mrs. Hayden a duty of care to protect her from injury caused by other fans who scrambled for a loose football.[12] Mrs. Hayden argued that her case was covered by "premises liability principles" and the applicable standard of care should be determined by her status as an invitee on Notre Dame's campus.[13] Mrs. Hayden argued that as a business invitee, Notre Dame owed her a duty of protection from the type of injury she suffered.[14] The parties agreed that Mrs. Hayden was a business invitee, but disagreed as to whether a duty of protection was owed to her.[15] In an important footnote, the court stated that "[f]or purposes of this appeal, we assume that the unknown third party's actions in lunging for the football and knocking Letitia Hayden down constitute a criminal act."[16]

Mrs. Hayden testified that she and her husband were longtime season ticket holders of Notre Dame football and regularly had seats in the south endzone behind the goalposts.[17] In her long history of attending games, Mrs. Hayden asserted that on numerous occasions, footballs would fly into the stands around her and people would jump to get the ball.[18] Mrs. Hayden also testified that

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9. *See* Trial Court Order Granting Defendant's Motion for Summary Judgment at 3, *Hayden* (No. 71C01-9703-CT-00020). Neither party ever identified the fan that injured Mrs. Hayden. The court never stated or implied that the fan's identity was relevant in deciding the issues in this case. However, it is possible that if Mrs. Hayden could have identified this fan, she may not have needed to sue Notre Dame for the injuries that she suffered.

10. *See* Hayden v. Univ. of Notre Dame, 716 N.E.2d 603, 605 (Ind. Ct. App. 1999).

11. *Id.* (citing Wickey v. Sparks, 642 N.E.2d 262, 265 (Ind. Ct. App. 1994)).

12. *Id.* The court noted that whether the defendant owed the plaintiff a duty is generally a question of law that a court must determine. *Id.* (citing Webb v. Jarvis, 575 N.E.2d 992, 995 (Ind. 1991)).

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 605 n.1. The significance of this footnote is that for the remainder of the trial, the parties argued over whether Notre Dame should have foreseen that a criminal act would occur in the stands, and could injure a fan, like Mrs. Hayden.

17. *Id.* at 606; *see also* Defendant's Memorandum in Support of Summary Judgment at 2, *Hayden* (No. 71C01-9703-CT-00020) (indicating that the Haydens had season tickets for over twenty years).

18. *See* Hayden v. Univ. of Notre Dame, 716 N.E.2d 603, 606 (Ind. Ct. App.

several years earlier, she saw another woman injured during a scramble for a loose football.[19] During the game in which she was injured, Mrs. Hayden claimed that she was knocked down two times earlier in the game by fan misconduct, but she admitted that she was not injured and did not notify Notre Dame ushers or ask to be reseated.[20]

Mr. Hayden also testified, and it was his belief that the net behind the goalpost "caught the ball only about fifty percent of the time that it was kicked."[21] When the net did not catch the ball, it was Mr. Hayden's opinion that the ball would fall in the stands and fans would try desperately to get the football.[22] Mr. Hayden stated that a few years prior to the incident in question, he had been "jostled a number of times" and even "knocked off his feet and thrown into the next row by fans eager to recover a football."[23] He also claimed that the "Notre Dame ushers witnessed fans being jostled in scrambles for the ball," but the ushers "did not make aggressive attempts to recover the balls" or restrain the fans.[24] Finally, Mr. Hayden testified that unlike prior years, Notre Dame's student managers no longer tried to retrieve the footballs from the fans and return them to the field of play.[25] Based on the circumstances surrounding Mrs. Hayden's injury, she argued that it was foreseeable that a fan could injure her and therefore, Notre Dame owed a duty to her, or a fan in her position, to protect her from such conduct.[26]

Notre Dame filed a motion for summary judgment, arguing that they did not owe "a legal duty to protect Letitia Hayden from the intentional criminal acts of an unknown third person."[27] Notre Dame argued that the fan's conduct was a criminal battery under Indiana law.[28] In defining a criminal battery, Indiana requires that a person "knowingly or intentionally touches another person in a rude, insolent or angry manner . . . ."[29] Notre Dame pointed out that under the

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1999).

19. *Id.*

20. *Id.*; *see also* Trial Court Order Granting Defendant's Motion for Summary Judgment at 4, *Hayden* (No. 71C01-9703-CT-00020) (Based on the tone of the trial judge's language, it appears that the judge found this testimony to be rather suspicious.).

21. *Hayden*, 716 N.E.2d at 607. This was strictly Mr. Hayden's opinion; he presented no actual evidence to support his statement.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 605. The state of Indiana grants summary judgment when the "designated evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Id.*

28. *See* Brief of Appellee University of Notre Dame at 11, *Hayden* (No. 71C01-9703-CT-00020).

29. *Id.* (citing IND. CODE § 35-41-2-1(a) (1998)).

Indiana Criminal Code, "a person engages in conduct 'knowingly' if, when he engaged in the conduct, he is aware of a high probability that he is doing so."[30] Notre Dame argued that "it defie[d] logic to suggest that the unknown spectator was not aware that by diving into a crowd of people there was a high probability he would touch at least one of them in a rude, insolent or angry manner."[31] Relying on the definition of criminal battery, Notre Dame concluded that it was not foreseeable that a third party would commit a criminal battery and, as a result, they owed no duty to anticipate the action and protect Mrs. Hayden.[32]

The trial court granted Notre Dame's motion for summary judgment.[33] The trial court held that Notre Dame did not owe Mrs. Hayden a legal duty to protect her from the fan misconduct because such conduct was unforeseeable.[34] Despite the Haydens' testimony about prior acts of spectator scrambles in the stands, the trial court found no evidence that Notre Dame knew or should have known (constructive knowledge) that an unknown fan was likely to harm Mrs. Hayden.[35] The trial court also found that the Haydens' testimony was conclusory and consisted of self-serving statements that did not create a genuine issue of material fact.[36] Mrs. Hayden appealed the trial court decision to the Indiana Court of Appeals.[37]

The court of appeals examined recent Indiana Supreme Court case law that had articulated the test for determining whether a landowner's duty of care extended to protecting invitees from the criminal acts of third parties.[38] The court found that the trial court erred in determining that no duty existed and should not have entered summary judgment in favor of Notre Dame.[39] The appellate court held that, based on the totality of the circumstances, "Notre Dame owed Letitia Hayden a duty to take reasonable steps to protect her from injury due to the actions of other fans in attempting to retrieve footballs which land in the seating area."[40]

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30. *Id.* (citing IND. CODE § 35-41-2-2(b) (1998)).

31. *Id.*

32. *See* Hayden v. Univ. of Notre Dame, 716 N.E.2d 603, 605 (Ind. Ct. App. 1999).

33. *Id.* at 604.

34. *See* Trial Court Order Granting Defendant's Motion for Summary Judgment at 4, *Hayden* (No. 71C01-9703-CT-00020).

35. *Id.*

36. *Id.* at 7.

37. *See Hayden*, 716 N.E.2d at 604.

38. *Id.*

39. *Id.* at 607.

40. *Id.*

III. LEGAL BACKGROUND

A. General Duty Owed to Invitees

An invitee is a person who enters another person's land by the express or implied invitation of the landowner for some purpose related to the activities or interests of the landowner.[41] A public invitee is a person who is invited to enter another person's land as a member of the public for a purpose for which the land is held open to the public.[42] For example, a public invitee would be a person who visits a public park or public beach.[43] A business invitee is a person who is invited to enter another person's land for the primary purpose of doing business with the landowner or for some purpose connected with the use of the land by the landowner.[44] Examples of a business invitee include people who enter stores, restaurants, and places of entertainment.[45] Fans who come onto a University's property for the purpose of watching a football game or any other sporting event are business invitees.[46]

In *Indermaur v. Dames*,[47] an 1866 English decision, the court established the duty owed to invitees, a rule that has been adopted in American common law jurisdictions.[48] Simply stated, the duty owed to an invitee is to exercise reasonable care for his safety, provided that the invitee will not discover the danger or will fail to protect himself from the danger.[49] The landowner "is not an insurer of the safety of [its] invitees," but the landowner has a duty to exercise reasonable care to everything that threatens or could potentially threaten the invitee with an unreasonable risk of harm.[50] The landowner must take precautions that a reasonably prudent landowner would take to make the premises reasonably safe for his invitees.[51] This includes a duty to act reasonably by inspecting the premises to discover any dangerous natural or

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41. *See* RESTATEMENT (SECOND) OF TORTS § 332 (1965).

42. *See* Dowd v. Portsmouth Hosp., 193 A.2d 788, 791 (N.H. 1963).

43. *See* RESTATEMENT (SECOND) OF TORTS § 332 (1965).

44. *See* RESTATEMENT (SECOND) OF TORTS § 332 (1965).

45. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 61, at 419 (5th ed. 1984).

46. *See* Hayden v. Univ. of Notre Dame, 716 N.E.2d 603, 605 (Ind. Ct. App. 1999); *see also* Bearman v. Univ. of Notre Dame, 453 N.E.2d 1196, 1198 (Ind. Ct. App. 1983); Scott v. Univ. of Mich. Athletic Ass'n, 116 N.W. 624 (Mich. 1908).

47. 1 L.R.-C.P. 274, *aff'd*, 2 L.R.-C.P. 311 (1866).

48. *See* KEETON, *supra* note 45, § 61, at 419.

49. *See* RESTATEMENT (SECOND) OF TORTS §§ 341A, 343 (1965).

50. KEETON, *supra* note 45, § 61, at 425.

51. *See* RESTATEMENT (SECOND) OF TORTS § 344 cmt. d (1965). The Indiana Supreme Court adopted this view. *See* Burrell v. Meads, 569 N.E.2d 637, 639-40 (Ind. 1991) (holding that a landowner has a duty to exercise reasonable care to protect an invitee while the invitee is on the landowner's premises).

artificial conditions, and to warn invitees of such dangers or take reasonable steps to make the conditions safe.[52] Moreover, the landowner must take reasonable steps to protect invitees from foreseeable dangers that are created from the use of the property.[53] However, a landowner is not liable for injuries that result from unforeseeable risks or risks that the landowner neither knew about nor could have discovered with reasonable care.[54]

B. Duty to Protect Invitees from Criminal Acts of Third Parties

The interesting question at the heart of the *Hayden* case is the extent of a landowner's duty to protect a business invitee from criminal acts committed by third persons on the premises. During the past decade, this topic has been the subject of substantial debate among courts and legal scholars.[55] In early case law, courts generally denied recovery to business invitees under the theory that the business had no duty to protect its invitees from criminal acts.[56] Yet, the majority of courts that have addressed this issue in recent decisions agree that, while landowners are not to be made insurers of their invitees safety, landowners do have a duty to take reasonable precautions to warn or protect their invitees from foreseeable tortious or criminal acts of third parties.[57] Most state courts, including Indiana[58] and Missouri[59] courts have followed that reasoning.

In *Kinsey v. Bray*,[60] a 1992 Indiana decision, a woman was attacked by her former husband's girlfriend, whom she did not know.[61] The former husband argued that he had no duty to protect his ex-wife from the violent acts of his

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52. *See* RESTATEMENT (SECOND) OF TORTS §§ 341A, 343 (1965).

53. *See* KEETON, *supra* note 45, § 61, at 425.

54. *See* KEETON, *supra* note 45, § 61, at 426.

55. *See* McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 897 (Tenn. 1996) (noting the numerous court decisions and law review articles that have been written in this area of the law).

56. *Id.*

57. *Id.* at 898-99 (citing Cotterhill v. Bafile, 865 P.2d 120, 122-23 (Ariz. 1993); Jardel Co. v. Hughes, 523 A.2d 518, 525 (Del. 1987); Martinko v. H-N-W Assocs., 393 N.W.2d 320, 321-22 (Iowa 1986); Mundy v. Dep't of Health & Human Res., 620 So. 2d 811, 813-14 (La. 1993); Erichsen v. No-Frills Supermkts., 518 N.W.2d 116, 118-19 (Neb. 1994); Doud v. Las Vegas Hilton Corp., 864 P.2d 796, 799 (Nev. 1993); Butler v. Acme Mkts., 445 A.2d 1141, 1145-46 (N.J. 1982); Nallan v. Helmsley-Spear, Inc., 407 N.E.2d 451, 457-58 (N.Y. 1980); Foster v. Winston-Salem Joint Venture, 281 S.E.2d 36, 38-39 (N.C. 1981); Zueger v. Carlson, 542 N.W.2d 92, 96-97 (N.D. 1996); Uihlein v. Albertson's, Inc., 580 P.2d 1014, 1018 (Or. 1978)); *see also* RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965).

58. *See* Kinsey v. Bray, 596 N.E.2d 938 (Ind. Ct. App. 1992).

59. *See* Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59 (Mo. 1988).

60. 596 N.E.2d 938 (Ind. Ct. App. 1992).

61. *Id.* at 939.

girlfriend.[62] The Indiana Court of Appeals disagreed and following the principles in the *Restatement of Torts*, held that because the ex-husband knew of his girlfriend's violent propensities, he had a duty to warn his ex-wife of the potential violent acts of the third party (his girlfriend).[63]

In *Madden v. C & K Barbecue Carryout, Inc.*,[64] the Missouri Supreme Court consolidated two cases to establish the duty of protection in Missouri.[65] In *Madden*, the plaintiff was forcibly kidnapped on a restaurant parking lot in St. Louis City.[66] In *Decker*, a couple was abducted and later murdered by two unknown assailants on a shopping center parking lot.[67] The court held that a landowner has a duty to protect business invitees from criminal acts of unknown third parties, if the landowner knows or has reason to know, from his observations or from his past experience, that third party conduct could harm an invitee.[68] The court remanded both *Madden* and *Decker* to the lower court to re-examine the facts in light of the court's standard.[69]

C. Determination of Whether a Criminal Act Is Foreseeable

After courts determine that landowners have a duty to protect business invitees from foreseeable criminal violence by third persons on the premises, it is then necessary to determine whether the criminal act in question was foreseeable.[70] Courts use four basic tests to determine whether the act was foreseeable under the circumstances of a particular case: (1) the specific harm test, (2) the prior similar incidents test, (3) the balancing test, and (4) the totality of the circumstances test.[71]

"Under the specific harm test, a landowner owes no duty unless the owner knew or should have known that the specific harm was occurring or was about

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62. *Id.*

63. *Id.* at 940.

64. 758 S.W.2d 59 (Mo. 1988).

65. *Id.*

66. *Id.*

67. *Id.* at 60-61.

68. *Id.* at 61 (citing RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965)).

69. *Id.* at 62.

70. *See* Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 971 (Ind. 1999).

71. *Id.* at 971 (citing Boren v. Worthen Nat'l Bank, 921 S.W.2d 934, 940-41 (Ark. 1996); Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 215-16 (Cal. 1993); McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 899-901 (Tenn. 1996); Krier v. Safeway Stores 46, Inc., 943 P.2d 405 (Wyo. 1997); Michael J. Yelnosky, Comment, *Business Inviters' Duty to Protect Invitees from Criminal Acts*, 134 U. PA. L. REV. 883, 891-900 (1986)).

to occur."[72] Most courts do not use this approach because the test is vague, offers too little protection to invitees, and too much protection to landowners.[73]

Under the prior similar incidents test ("PSI") "a landowner may owe a duty of reasonable care if evidence of prior similar incidents of crime on or near the landowner's property shows that the crime in question was foreseeable."[74] Courts differ in their application of this test, but almost always consider, "the number of prior incidents, their proximity in time and location to the present crime, and the similarity of the crimes."[75] While the PSI approach is clearer in terms of putting the landowner on notice of foreseeability because of past incidents, many courts have rejected this test because of public policy considerations.[76] Public policy considerations include the fact that the first victim may not recover, landowners have little incentive to implement any security measures until after an incident occurs, the test incorrectly focuses on the specific crime rather than the general risk of foreseeable harm, and a lack of prior similar incidents can relieve a defendant of liability when the criminal act in question was foreseeable.[77]

In general, Missouri follows the PSI approach when "special facts" give rise to a duty to protect business invitees from criminal acts of unknown third persons.[78] Special facts often exist because of the relationship between the victim and tortfeasor.[79] However, special facts also exist in two other circumstances.[80] One, "persons known to be violent are present on the premises of the business or an individual conducts himself in such a manner as to indicate danger and sufficient time exists to prevent injury."[81] Two, "the attacker is unknown but, due to prior attacks on the premises, a duty arises to protect invitees because subsequent attacks become foreseeable."[82] Absent these situations, in Missouri it is difficult for the defendant to be liable under the PSI test.[83]

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72. *Id.* (citing *McClung*, 937 S.W.2d at 895; *Boren*, 921 S.W.2d at 940).

73. *See McClung*, 937 S.W.2d at 895 (abrogating *Cornprost v. Sloan*, 528 S.W.2d 188, 198 (Tenn. 1975), which had used this test).

74. *Delta Tau Delta*, 712 N.E.2d at 972.

75. *Id.*

76. *Id.*

77. *Id.*

78. *See* Thiele v. Rieter, 838 S.W.2d 441, 443 (Mo. Ct. App. 1992).

79. *Id.* The court noted some common special relationships, such as innkeeper-guest, school-student, and sometimes employer-employee, in which the landowner has a duty to protect the invitees from acts of third parties. *Id.*

80. *Id.* (citing Faheen by Hebron v. City Parking Corp., 734 S.W.2d 270, 273 (Mo. Ct. App. 1987)).

81. *Id.* (citing *Faheen*, 734 S.W.2d at 273).

82. *Id.* (citing Madden v. C & K Barbeque Carryout, Inc., 758 S.W.2d 59, 62 (Mo. 1988)).

83. *Id.*; *see also Madden*, 758 S.W.2d at 61 (applying the PSI test and finding that

The third approach used by courts for determining foreseeability is the balancing test.[84] Under this test, the court balances "the degree of foreseeability of harm against the burden of the duty to be imposed."[85] "As the foreseeability and degree of potential harm increase, so too, does the duty to prevent it."[86] The Indiana Supreme Court rejected this test because it focuses too much on prior similar incidents and whether the defendant took appropriate precautions, which is a breach of duty question for the jury.[87]

The final approach to foreseeability and the one explicitly adopted in recent decisions by the Indiana Supreme Court, is the totality of the circumstances test.[88] Under this test, "a court considers all of the circumstances surrounding an event, including the nature, condition, and location of the land, as well as the prior similar incidents, to determine whether a criminal act was foreseeable."[89] The Indiana Supreme Court found the totality of the circumstances approach to be the best test because it allows a court to consider and analyze all of the circumstances in determining whether a criminal act was foreseeable.[90] Prior similar acts are a substantial factor in determining foreseeability, but "a lack of prior similar incidents will not preclude a claim where the landowner knew or should have known that the criminal act was foreseeable."[91] However, the court noted that a limit to this test is that it tends to make the foreseeability question broad and unpredictable, effectively requiring landowners to anticipate crime in situations where crime may not be reasonably anticipated.[92]

To further illustrate the totality of the circumstances test and the mandatory authority for the *Hayden* court, it is important to examine the facts in *Delta Tau Delta, Beta Alpha Chapter v. Johnson*.[93] Delta Tau Delta, a fraternity house at Indiana University had a party in October of 1990.[94] The plaintiff was an undergraduate student who attended the Delta Tau Delta party at the fraternity

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the defendant was liable because of prior attacks on the defendant's premises).

84. *See* Delta Tau Delta, Beta Alpha Chapter v. Johnson, 712 N.E.2d 968, 972 (Ind. 1999).

85. *Id.* (citing McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 901 (Tenn. 1996)).

86. *Id.*

87. *Id.* at 972-73.

88. *Id.* at 972.

89. *Id.*

90. *Id.* at 973.

91. *Id.*

92. *Id.* at 972 (citing Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207, 214-15 (Cal. 1993) (rejecting the totality of the circumstances test in favor of the balancing test); McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 900 (Tenn. 1996) (adopting the balancing test)).

93. 712 N.E.2d 968 (Ind. 1999).

94. *Id.* at 970.

house and needed a ride home at approximately 3:30 a.m.[95] A common acquaintance of the plaintiff offered to drive her home, but before doing so, locked himself and the plaintiff in a room and sexually assaulted her.[96]

In applying the totality of the circumstances test the court held that Delta Tau Delta owed the plaintiff a duty of reasonable care that included a duty to take reasonable precautions to protect her from sexual assault by third parties on its premises.[97] The court looked at Delta Tau Delta's past incidents of sexual assault and forced alcohol consumption at its parties; Delta Tau Delta's awareness of a date rape problem on campus; and the legal action taken against other fraternities for sexual assault. The court concluded that under the totality of the circumstances, it was foreseeable that a criminal assault could occur.[98] As a result, Delta Tau Delta had "a duty to take reasonable care to protect [the plaintiff] from a foreseeable sexual assault."[99]

Vernon v. Kroger Co.[100] also illustrates Indiana's application of the totality of the circumstances test.[101] In *Vernon*, the plaintiff was beaten on the parking lot of a Kroger grocery store by a shoplifter attempting to flee.[102] The court found that shoplifting at this Kroger store was not unusual and in the prior two years, the police had been to the store numerous times for criminal incidents, such as violence, battery, and shoplifting.[103] Based on the totality of the circumstances, the court held that it was foreseeable that the plaintiff could be injured and therefore, Kroger had a duty to protect the plaintiff from the criminal action.[104]

Finally, in *L.W. v. Western Golf Ass'n*,[105] a female student was raped by a male student in a residence hall owned by the defendant.[106] Unlike the previous two cases in which the court found the criminal acts were foreseeable, in this case, the court did not find that the rape was foreseeable.[107] Based on a lack of prior incidents and insufficient evidence to indicate foreseeability, the court held that the defendant did not owe the plaintiff a duty of protection.[108]

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95. *Id.*
96. *Id.*
97. *Id.* at 973.
98. *Id.* at 974.
99. *Id.*
100. 712 N.E.2d 976 (Ind. 1999).
101. *Id.* at 979.
102. *Id.* at 978.
103. *Id.* at 980-81.
104. *Id.* at 981.
105. 712 N.E.2d 983 (Ind. 1999).
106. *Id.*
107. *Id.*
108. *Id.*

D. Spectator Sports Injuries: An Exception?

While the law is relatively clear that landowners have a duty to protect business invitees against foreseeable criminal violence by third persons on the premises,[109] numerous courts have considered cases specifically involving fans injured by third parties at sporting events and have concluded that the landowner was not liable because the spectator misconduct was not foreseeable.[110] In the sports setting, courts have often found implied assumption of risk.[111] Implied assumption of risk is when the plaintiff expressly or impliedly consents to assume a risk created by the defendant.[112] If the defendant shows that the plaintiff recognized and understood the particular risk or danger involved, yet voluntarily chose to encounter it, the plaintiff is barred from recovery from the defendant for his negligence.[113] It is assumed that spectators at sporting events know the risks of being hurt by flying baseballs, hockey pucks, or golf balls and therefore, cannot sue the landowners from injuries that result at the events.[114]

Hudson v. Kansas City Baseball Club[115] is a Missouri decision that addressed the assumption of risk doctrine at a baseball game.[116] In *Hudson*, the plaintiff was struck by a foul ball and sued the baseball team.[117] The court found that the baseball team had a duty to provide protected or screened seating for fans who wanted to be shielded from foul balls.[118] However, the court held that because the plaintiff had a choice to buy a ticket for either a protected or unprotected seat and he had full knowledge of the dangers of the baseball, he assumed the risk of being struck by a foul ball and therefore was not entitled to recover.[119] The court also stated that "in baseball, the patron participates in the sport as a spectator only, but in so doing, subjects himself to the dangers

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109. *See supra* text accompanying note 57.

110. *See* Brief of Appellee University of Notre Dame at 11, *Hayden* (No. 71C01-9703-CT-00020) (citing Porter v. Cal. Jockey Club, Inc., 285 P.2d 60, 61 (Cal. Ct. App. 1955) (not foreseeable that a spectator at a track would be run into violently by another spectator); Weldy v. Oaklin High Sch. Dist., 65 P.2d 851, 852 (Cal. Ct. App. 1937) (not foreseeable that a spectator at a football game would be hit by a bottle thrown by a fellow spectator); Johnson v. Mid-South Sports, Inc., 806 P.2d 1107, 1109 (Okla. 1991) (wrestling promoter not liable for attack of wrestling spectator by fellow spectators)).

111. *See* KEETON, *supra* note 45, § 61, at 485-86.

112. *See* KEETON, *supra* note 45, § 61, at 485-86.

113. *See* KEETON, *supra* note 45, § 61, at 485-86.

114. *See* KEETON, *supra* note 45, § 61, at 485-86.

115. 164 S.W.2d 318 (Mo. 1942).

116. *Id.* at 319.

117. *Id.*; *see* Brown v. S.F. Ball Club, Inc., 222 P.2d 19 (Cal. 1950) (holding that a fan at a professional baseball game assumed the risk of being struck by a thrown or batted ball and if injured, could not recover damages from the team or stadium owner).

118. *See Hudson*, 164 S.W.2d at 321.

119. *Id.* at 324.

necessarily and usually incident to and inherent in the game."[120] "This does not mean that a spectator assumes the risk of being injured by the proprietor's negligence, but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks and hazards inherent in and incident to the game."[121]

Similar to the facts in *Hayden*, in *Lee v. National League Baseball Club of Milwaukee, Inc.*,[122] a fan was injured at a professional baseball game during a scramble for a baseball that flew into the stands.[123] A crowd of ten to twelve people converged on the plaintiff in an effort to catch the foul ball and as a result of the scramble, the plaintiff fractured one of her ribs and bruised her left shoulder.[124] One of the issues presented to the court "was whether the baseball club was negligent for failing to take proper steps to protect the plaintiff from injury by the acts of other spectators."[125] The court stated a landowner could be liable if he does not take "reasonable and appropriate measures to restrict the conduct of such third parties, of which he should have been aware and should have realized were dangerous."[126] The court held that an issue of fact was presented as to whether the baseball club was negligent in protecting the plaintiff and the trial court's finding that the defendant was negligent was conclusive on the Wisconsin Supreme Court.[127]

IV. INSTANT DECISION

In *Hayden*, the court addressed whether Notre Dame owed Mrs. Hayden a duty of care to protect her from injury caused by other fans who scrambled for a loose football that landed in the seating area around her.[128] Mrs. Hayden argued that because of the numerous times that footballs had flown into the seats around her, it was foreseeable that another fan would attempt to injure her.[129] Notre Dame argued that it owed no duty to protect Mrs. Hayden from a third party's criminal act because the act was unforeseeable and could not be anticipated.[130]

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120. *Id.* at 323.

121. *Id.*

122. 89 N.W.2d 811 (Wis. 1958).

123. *Id.*

124. *Id.* at 812.

125. *Id.* at 813.

126. *Id.* at 813-14.

127. *Id.* at 814.

128. *See* Hayden v. Univ. of Notre Dame, 716 N.E.2d 603, 605 (Ind. Ct. App. 1999).

129. *Id.* at 606. For the testimony of Mr. and Mrs. Hayden, see *supra* text accompanying notes 17-26.

130. *See Hayden*, 716 N.E.2d at 603. For Notre Dame's testimony, see *supra* text accompanying notes 27-32.

While the *Hayden* court was analyzing this case, the Indiana Supreme Court handed down three decisions that established the test for whether a landowner's duty to its invitees extends to protecting them from the criminal acts of third parties.[131] Relying on *Delta Tau Delta*, *Vernon*, and *Western Golf Ass'n*,[132] the *Hayden* court stated that Indiana courts must apply a totality of the circumstances test to determine if liability exists for the landowner.[133] Under the totality of the circumstances test, "the court considers all of the circumstances surrounding the event, including the nature, condition, and location of the land, as well as prior similar incidents to determine whether a criminal act was foreseeable."[134]

The court applied this test and found that the totality of the circumstances indicated that Notre Dame should have foreseen that an injury would likely result to Mrs. Hayden from fans who dive for footballs after they land in the stands, even if such injury is caused intentionally and constituted a criminal battery.[135] Because the injury was foreseeable, Notre Dame owed a legal duty to Mrs. Hayden to protect her from getting hurt while watching Notre Dame football.[136] The court believed that Notre Dame knew the enthusiasm its football games generate for its fans and it is "such enthusiasm that drives some spectators to attempt to retrieve a football to keep as a souvenir."[137]

Moreover, the court gave strong weight to the Haydens' testimony.[138] Unlike the trial court who questioned the Haydens' testimony, the appeals court believed that there were many prior incidents involving fans being bumped or injured by other fans who attempted to retrieve footballs.[139] The court found Mrs. Hayden's testimony particularly relevant because during her long history of attending Notre Dame football games, she had witnessed footballs fly into the stands and people jump to retrieve the ball.[140] Also weighing heavily in favor of the plaintiff was Mr. Hayden's testimony that the goalpost only caught the ball about fifty percent of the time that it was kicked.[141] When the net did not catch the ball, it would fly into the crowd and scrambles would result.[142] Mr. Hayden claimed at one point that he was knocked down by fans trying to retrieve a

131. *See Hayden*, 716 N.E.2d at 605.
132. *See supra* text accompanying notes 89-108.
133. *See Hayden*, 716 N.E.2d at 605.
134. *Id.* at 605-06.
135. *Id.* at 606.
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 607.
142. *Id.*

football and Notre Dame ushers saw these type of scrambles, but did nothing to stop them.[143]

Based on the totality of the circumstances, including a heavy reliance on the plaintiffs' testimony,[144] the court held that "Notre Dame owed Mrs. Hayden a duty to take reasonable steps to protect her from injury due to the actions of other fans."[145] The appellate court held that the trial court erred in finding that no duty existed and should not have entered summary judgment for Notre Dame.[146]

V. COMMENT

The court in *Hayden* decided a hot topic among legal scholars and commentators—the extent of a landowner's duty to a business invitee to protect him from criminal violence by third persons on the premises.[147] More specifically, the Indiana appellate court addressed, whether Notre Dame owed a duty of care to its fans to protect them from the criminal actions of other spectators.[148] While the law is becoming clearer, in that landowners have a duty to take reasonable precautions to warn or protect their invitees from the foreseeable tortious or criminal acts of third parties,[149] four different approaches exist to determine whether a criminal act was foreseeable.[150] The *Hayden* court followed the law and precedent set forth by the Indiana Supreme Court and applied the "totality of the circumstances" test, an approach that has been rejected by many courts.[151] The use of the totality of the circumstances approach caused the court to reach an incorrect result in this case and may have created dangerous policy implications in the process.

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143. *Id.* The Haydens' testimony was based on their personal experiences at Notre Dame football games and not based on any research conducted by them or their attorneys. While Mr. Hayden testified that the net behind the goalpost only caught the ball fifty percent of the time, that was strictly his opinion. The accuracy could have been much higher or lower. The same holds true for the Haydens' observations of past incidents in the stands. There is no concrete evidence to prove that jostling in the stands occurs once a game, once a season, or once a decade. *See* Defendant's Memorandum in Support of Summary Judgment at 9-11, *Hayden* (No. 71C01-9703-CT-00020).

144. The trial court found this same testimony conclusory and self-serving. *See supra* text accompanying note 36.

145. Hayden v. Univ. of Notre Dame, 716 N.E.2d 603, 607 (Ind. Ct. App. 1999).

146. *Id.*

147. *See supra* text accompanying note 55.

148. *Hayden*, 716 N.E.2d at 606.

149. *See supra* text accompanying note 57.

150. *See supra* text accompanying note 71.

151. *See* McClung v. Delta Square Ltd. P'ship, 937 S.W.2d 891, 900 (Tenn. 1996). The court noted that other courts have rejected the totality of circumstances test because the test is "'imprecise,' 'unfair,' and 'troublesome' because it makes liability for merchants even less predictable than under the prior incidents rule." *Id.* (citations omitted).

A. Court's Decision and Misapplication of Facts to Law

Although the *Hayden* court had to follow the totality of the circumstances approach,[152] in applying this test, it is extremely questionable whether Notre Dame should have foreseen that a criminal act by one fan, would cause an injury to another fan. The Haydens had been season ticket holders at Notre Dame football games for over twenty years and observed what occurred in the stands around them during the course of the games.[153] The court believed the Haydens' testimony of many prior incidents of fans being jostled in scrambles for footballs.[154] However, even if the Haydens' testimony was true, it is not necessarily foreseeable that another fan, three rows back, would try to injure Mrs. Hayden via a criminal act.

The appellate court did not dispute that the third party's actions toward Mrs. Hayden constituted a criminal act.[155] Notre Dame defined this criminal act as a criminal battery, which occurs in Indiana when "a person knowingly or intentionally touches another person in a rude, insolent or angry manner."[156] While the appellate court did not specifically say that the act was a criminal battery, the reckless criminal conduct that the plaintiff encountered would require "intent" or "purpose" to injure.[157] When fans have an opportunity to get a football that flies into the stands, it is foreseeable that contact may result during a scramble for the football. However, it is unforeseeable and extremely difficult to predict that a person would 'knowingly' or 'intentionally' touch another person in an angry or rude manner. It seems highly unlikely that fans, in an effort to obtain a football, would *intentionally* place their hands inappropriately on another fan's body. Granted, accidents can happen, but in *Hayden*, the court believed the fan's actions were no accident when they assumed that the act was a criminal one.

To illustrate this point, suppose that a football goes into the crowd and lands at spectator A's feet. It is quite possible and perhaps likely, that spectator B will want to try to get the football as a souvenir. However, it is not foreseeable that spectator B would intentionally try to hurt A in his effort to obtain the football. B might accidentally bump into A, but to suggest that B would purposefully want to hurt A, to get the ball, seems illogical in the context of American sporting events. Though most fans in America want to get balls that go into the crowd, most fans stop short of intentionally injuring other fans. Because most

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152. *See* Hayden v. Univ. of Notre Dame, 716 N.E.2d 603, 606 (Ind. Ct. App. 1999).

153. *See supra* notes 17-18 and accompanying text.

154. *See supra* text accompanying note 139.

155. *See Hayden*, 716 N.E.2d at 605 n.1.

156. *See supra* text accompanying note 29.

157. *See* Brief of Appellee University of Notre Dame at 11, *Hayden* (No. 71C01-9703-CT-00020).

fans do not intentionally try to injure other fans, when in those rare instances intentional acts do occur, the landowner should not be held accountable because the acts are unforeseeable or unpredictable to him.

Another significant fact in the *Hayden* case is that the fan who injured Mrs. Hayden was seated *three rows* behind her in the stands.[158] It bears reiterating that this fan was not next to her or even in the row behind her; rather, this fan jumped down three rows. Whether the fan was intoxicated or extremely foolish was not an issue in the case, but regardless of what may have caused him to injure Mrs. Hayden, it seems impossible for Notre Dame to foresee the number of rows that fans would jump to injure other fans. This holds special weight considering the fact that the football game was sold out and the three rows behind Mrs. Hayden were filled with other fans. Had the three rows behind Mrs. Hayden been empty or had she been injured by a fan in her row, or the row behind her, or the row in front of her, it does become more foreseeable that she could be injured. Yet, in analyzing the *Hayden* fact pattern under the totality of the circumstances test, the only logical conclusion is that the unknown spectator's act was unforeseeable to the landowner because of his distance from Mrs. Hayden.

Moreover, finding foreseeability of fans injuring other fans at a football game is different than other sports in which balls routinely go into the stands. There is no question that obtaining a souvenir at a professional sporting event is a thrill for most fans, and for many fans a lifetime memory. In baseball and hockey, balls and pucks routinely fly into the stands, and fans may retrieve them as souvenirs. It is more likely that injuries could result to spectators in those sports because of the frequency that balls and pucks fly into the crowd. Football, however, is a different situation.

In football, the only time the ball ever has a reasonable chance of going into the stands is on an extra point or field goal attempt when the kicker attempts to kick the ball through the goalposts stationed in the back of the endzone. In most stadiums, the goalposts are usually at least fifteen feet away from the stands. In order to alleviate the problem of the ball sailing through the goalposts and into the stands, most professional and college football stadiums have a net behind the goalposts to catch the football. Notre Dame has such a net.[159] One purpose of the net behind the goalposts is to retrieve the football so that it can be returned to the field of play. Unlike baseballs and hockey pucks, footballs are relatively expensive, and teams are not as generous in letting the fans take them home as souvenirs. The net also protects the fans behind the goalposts from getting hit by the ball. Every so often, the ball will fly over the net and into the stands. Mrs. Hayden argued that because Notre Dame had installed nets behind the

158. As a finding of fact, the trial court stated that the unknown spectator who injured Mrs. Hayden was seated three rows behind her. *See* Trial Court Order Granting Defendant's Motion for Summary Judgment at 3, *Hayden* (No. 71C01-9703-CT-00020).

159. Hayden v. Univ. of Notre Dame, 716 N.E.2d 603, 606 (Ind. Ct. App. 1999).

goalposts, Notre Dame thought that injuries caused by one fan to another were foreseeable and installed the net to prevent scrambles.[160] The trial court found that the existence of a net behind the goalposts was simply "irrelevant to Notre Dame's knowledge that one fan might injure another fan."[161] The trial court logically held that Notre Dame did not owe Mrs. Hayden a legal duty to protect her from the fan misconduct, because such conduct was unforeseeable.[162] Given this set of facts, even under the application of the totality of the circumstances test, the appellate court should have followed the lower court ruling with regard to foreseeability.

B. Possible Effectiveness of Missouri's PSI Test

Even though the *Hayden* court had to apply the totality of the circumstances test, the result may have been different in a jurisdiction, like Missouri, that employs the PSI test. Under the PSI test, "a landowner may owe a duty of reasonable care if evidence of prior similar incidents of crime on or near the landowner's property shows that the crime in question was foreseeable."[163] This is the better reasoned approach for a sports setting because strange incidents often happen in the stands at a sports venue that are not foreseeable and do not put the landowner on notice that such acts may occur. The facts in *Hayden* demonstrate this point. Under the PSI test, Notre Dame would not have owed a duty to Mrs. Hayden unless they knew of "special facts"[164] that indicated a danger to her safety at the football game. In this case, even though the plaintiffs claimed to have been bumped and knocked down on numerous occasions, they admitted that they never complained or reported any of these incidents to Notre Dame officials.[165] By applying the PSI test, it is likely that the court would not have found that Notre Dame had a duty to protect Mrs. Hayden because (1) Mrs. Hayden did not specifically tell Notre Dame of any spectator misconduct, and (2) Notre Dame and its ushers, had no reason to be aware of any spectator misconduct occurring around Mrs. Hayden. In fact, the trial court found that Notre Dame had neither actual nor constructive notice of any acts that would

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160. *See* Trial Court Order Granting Defendant's Motion for Summary Judgment at 7, *Hayden* (No. 71C01-9703-CT-00020).

161. Trial Court Order Granting Defendant's Motion for Summary Judgment at 7 n.7, *Hayden* (No. 71C01-9703-CT-00020).

162. *See supra* text accompanying note 34.

163. *See supra* text accompanying note 74.

164. *See supra* notes 78-83 and accompanying text (discussing the application of Missouri's PSI test).

165. *See* Trial Court Order Granting Defendant's Motion for Summary Judgment at 7, *Hayden* (No. 71C01-9703-CT-00020); *see also* Defendant's Memorandum In Support of Summary Judgment at 3, *Hayden* (No. 71C01-9703-CT-00020); *supra* text accompanying note 20.

merit a duty to its fans.[166] Therefore, the better reasoned approach to determine foreseeability in a sports setting might be to use the PSI test.

C. Public Policy Implications

Public policy dictates that landowners should not owe a legal duty to protect fans against the criminal actions of third parties, particularly in the sports context. From a policy standpoint, it is almost impossible to imagine how a university or other sports venue could be expected to protect its fans from a random and crazed fan who dives three rows down and lands on another fan.[167] If a stadium owner has to offer protection against these type of fans, the venue would be required to have policemen or guards in every section of the stadium, in every row, and perhaps in certain seats within the rows. This would be equivalent "to making babysitters out of university officials and other landowners," especially when, in Notre Dame's case, over 80,000 people gather for a football game.[168] As Notre Dame logically argued in its appellate brief, "[i]t would be unwarranted and impracticable from a public policy standpoint to impose a duty upon landowners, including colleges and universities, to become the insurers of the safety of their guests against unexpected and criminal acts by third parties."[169] Case law and scholars have repeatedly said that landowners are not to be made insurers of their invitees' safety.[170]

The policy implications of *Hayden* extend beyond making the university an insurer of its fans' safety. The people who will ultimately suffer the most are the fans. No reasonable fan attends a sporting event with the expectation of getting hurt and going to a hospital. Yet, most sports fans like to be close to the action and part of the game. It is simply impossible to predict which fans might make contact with each other or intentionally injure someone else. If stadium owners have to increase their security or protective measures because of contact that occurs when balls reach the stands, it will likely increase their expenses. If an owner's expenses increase, the team may have to raise ticket prices. If increased security is required to protect against the occasional crazed fan that dives for a football, the majority of fans who do not act crazily will be unfairly subjected to higher ticket prices. Even if the stadium owners could afford more security and

166. *See supra* text accompanying note 35.

167. *See* Brief of Appellee University of Notre Dame at 18, *Hayden* (No. 71A03-9812-CV-519).

168. *Id.*

169. *Id.* (citing Bradtmiller v. Hughes Props., Inc., 693 N.E.2d 85, 90 (Ind. Ct. App. 1998) (noting the lack of "overriding public policy considerations" that could overcome the absence of foreseeability of a criminal attack"); Welch v. R.R. Crossing, Inc., 488 N.E.2d 383, 388 (Ind. Ct. App. 1986) ("a proprietor of a tavern is not the insurer of the safety even of his patrons").

170. *See supra* text accompanying note 57.

ticket prices would not rise, extra security takes up space—space that belongs to the fans and space that the fans deserve.

D. What About Assumption of Risk?

The *Hayden* decision could erode the traditional assumption of risk doctrine that generally applies in sports settings.[171] In Missouri, as well as around the country, fans who are injured in the stands are usually unable to sue the team.[172] In sports, teams are usually able to disclaim fan liability either on their ticket stubs or by making such an announcement during the game.[173] Should *Hayden* or any future decision take away this protection from landowners, the floodgates could be opened by fans that were injured by others at sporting events. Stadium owners tend to have a lot of money, and greedy plaintiffs trying to take advantage of deep pockets could subject owners to unwarranted liability. This idea is hard to grapple with, considering that, in general, stadiums already take numerous measures to protect their fans, including ushers, security, and seats far away from the field of play. No matter how much additional protection a court might require, it will be difficult to develop a means for the absolute protection of fans from the criminal acts of third parties. It is important that the assumption of risk doctrine not be taken away by the courts.

VI. CONCLUSION

Should *Hayden* be adopted by other courts, including Missouri, the impact could be quite substantial. Fans at sporting events might be able to successfully sue the stadium owner if another fan intentionally injures them, which would erase traditional protection given to such owners. The fans could be penalized with higher ticket prices and forced to deal with excessive security. Thus, while the *Hayden* court tried to protect Mrs. Hayden from the unfortunate injury to her shoulder, it may have created a larger injury well beyond what Mrs. Hayden suffered—a change in spectator sport liability as it is currently known.

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171. *See supra* text accompanying note 111.

172. *See supra* text accompanying note 114.

173. Most professional sports teams' ticket stubs state that the ticket holder assumes all risks and danger incident to the game and agrees that the participating clubs, their agents, or their players are not liable for injuries from such causes incident to the game.